A

Public Prosecutor v Julius Christo Katzke

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05(LB)-264–06 OF 2017 (ZAF)
AHMADI ASNAWI, ABDUL RAHMAN SEBLI AND KAMARDIN HASHIM JJCA
18 JUNE 2019

C

Criminal Law — Firearms (Increased Penalties) Act 1971 — Proof of physical possession of firearms — Whether prosecution must prove exclusive possession of firearms and ammunition before criminal liability could be attached to respondent — Whether doubt was raised when there was assertion that firearms and ammunition could have been brought by unknown persons

D

This was an appeal against the order of acquittal and discharge by the High Court. The respondent was charged with trafficking in firearms and with possession of ammunition without lawful authority. The brief facts are as follows, surveillance was carried out on a yacht which was suspected to be carrying firearms without a license. When a raid was conducted on the yacht, there were two persons on board, the first being the respondent, and the second was a female. An examination on the yacht resulted in the discovery of two plastic boxes containing the seven firearms which formed the subject matter concerning the first charge and a gunny sack containing the 1,305 ammunition which formed the subject matter of the second charge, were found on the deck located at the rear of the yacht. The respondent was present when the firearms were found and he himself was the one who opened the plastic boxes. The respondent did not produce any arms license, but instead gave the documents which contained the identification details of the firearms ('exh P50A–E'). The firearms and ammunition were found to be serviceable when sent for ballistic tests. The respondent's defence was that he knew nothing about the firearms and ammunition and that he was only working freelance for the captain of the yacht by the name of Nick Coombes, that his job on the yacht was only to do maintenance works and that he had no business to enter the compartment area where the firearms and ammunition were found. The issues determined by the court were: (a) whether the presumption of trafficking was rebutted; (b) whether the respondent had knowledge of the firearms and ammunition in question; (c) whether the possibility of access to the compartment area by others raised a reasonable doubt and could exonerate the respondent; and (d) the admissibility of exh P50A–E.

E

F

G

H

I

Held, allowing the appeal and sentencing the accused to life imprisonment for the first charge and five years imprisonment for the second charge:

(1) It was a firm finding by the High Court that the respondent knew about the firearms at the time of the arrest, the presumption of trafficking under s 7(2) of the Firearms (Increased Penalties) Act 1971 ('the FIPA') was applicable as the number of firearms in his possession was more than two units. With the activation of the presumption, the respondent must, in order to succeed in his defence show that he was not trafficking in firearms within the meaning of s 2(1) paras (a)–(d) of the FIPA. However, by putting up the defence of no knowledge rather then the defence of no trafficking, the statutory presumption of trafficking under s 7(2) remained unrebutted at the conclusion of the trial. The respondent's defence stood or fell on his claim that he had no knowledge of the firearms. Therefore, it must follow that if he failed in his defence of knowledge, he must be convicted as there was no other defence to fall back on (see paras 22–23 & 32–33).

(2) Although considerations concerning the possibility of access by others to the compartment area were relevant, the learned JC fell into error in failing to test the respondent's evidence in light of SP3's unchallenged testimony that the respondent gave him exh P50A–E when asked if he had any licence to carry the firearms and ammunition. This was irrefutable proof that he knew about the firearms. Even if unknown persons had brought the firearms and ammunition on board the yacht, this fact alone did not exonerate the respondent of the offences charged if otherwise he had knowledge of the firearms and ammunition and was presumed to be trafficking by virtue of s 7(2) of the FIPA. No reasonable doubt could have been cast in the prosecution's case by the respondent's bare assertion that there was a possibility that the firearms and ammunition could have been brought on board by unknown persons (see paras 37–38, 43, 45 & 50).

(3) By itself, exh P50A–E may not prove possession of the firearms and ammunition, but the respondent's act of giving it to SP3 on being asked to produce an arms licence after the discovery of the firearms and ammunition is highly relevant to prove that he had knowledge of the firearms and ammunition. The relevance lies not in the truth of its contents but in the fact that it was produced by the respondent to show he had a licence to carry the firearms when he in fact had none. This was clearly relevant to prove the respondent's mental state at the time when he was asked to produce an arms licence(see paras 56 & 59–60).

[Bahasa Malaysia summary

Ini merupakan satu rayuan terhadap perintah lepas dan bebas oleh Mahkamah Tinggi. Responden dituduh atas kesalahan pengedaran senjata api dan pemilikan peluru tanpa otoriti sah. Fakta ringkas adalah seperti berikut, pemerhatian dijalankan atas satu kapal persiar yang disyaki membawa senjata api tanpa lessen. Apabila satu serbuan dilakukan atas kapal layar tersebut, ada

dua orang berada diatasnya, yang pertama merupakan respoden, dan yang kedua merupakan seorang wanita. Pemerikasaan terhadap kapal layar tersebut membawa kepada penemuan dua kotak plastik yang mengandungi tujuh senjata api yang menjadi perkara pertuduhan pertama dan satu guni yang mengandungi 1,305 butir peluru yang menjadi perkara pertuduhan kedua, ditemui di atas geladak di bahagian belakang kapal persiar. Responden hadir semasa senjata api tersebut ditemui dan dia sendiri merupakan individu yang membuka kotak plastik tersebut. Responden tidak mengemukakan apa-apa lesen senjata, akan tetapi memberikan dokumen yang mengandungi butiran pengenalan senjata api tersebut ('eksh P50A–E'). Senjata api dan peluru tersebut didapati dapat digunakan apabila dihantar untuk ujian balistik. Pembelaan responden adalah dia tidak mempunyai pengetahuan mengenai senjata api dan peluru dan dia hanya berkerja secara bebas untuk kapten kapal tersebut bernama Nick Coombes, bahawa tugasnya atas kapal tersebut adalah untuk menjalankan kerja-kerja penyelenggaraan dan dia tidak mempunyai apa-apa sebab untuk memasukki kawasan yang mana senjata api dan peluru tersebut ditemui. Isu untuk diputuskan oleh mahkamah adalah sama ada: (a) anggapan pengedaran dipatahkan; (b) sama ada responden mempunyai pengetahuan akan senjata api dan peluru tersebut; (c) sama ada kebarangkalian akses kepada kawasan kapal tersebut oleh individu lain membangkitkan keraguan munasabah dan boleh membebaskan responden; dan (d) kebolehterimaan eksh P50A–E.

Diputuskan, membenarkan rayuan dan menghukum tertuduh dengan pemenjaraan seumur hidup untuk pertuduhan pertama, dan lima tahun pemenjaraan untuk pertuduhan kedua:

(1) Mahkamah Tinggi mendapati bahawa responden mempunuyai pengetahuan mengenai senjata api pada waktu tangkapannya, anggapan pengedaran dibawah s 7(2) Akta Senjata Api (Penalti Lebih Berat) 1971 ('Akta') terpakai demgan bilangan senjata api dalam milikannya adalah lebih daripada dua. Dengan penggunaan anggapan ini, responden harus, untuk berjaya dalam pembelaannya menunjukan bahawa dia tidak mengedar senjata api tersebut dalam makna s 2(1) perenggan (a)–(d) Akta. Akan tetapi, dengan meletakkan pembelaan tiada pengetahuan dan bukannya pembelaan tiada pengedaran, anggapan statutori pengedaran dibawah s 7(2) kekal tidak dipatahkan diakhir perbicaraan. Pembelaan responden berjaya atau gagal atas pengataannya bahawa dia tiada pengetahuan akan senjata api tersebut. Oleh itu, ianya jelas bahawa sekiranya dia gagal dalam pembelaan pengetahuannya, dia harus disabitkan memandangkan dia tiada pembelaan lain untuk bergantung kepada (lihat perenggan 22–23 & 32–33).

(2) Walaupun pertimbangan mengenai kebarangkalian akses oleh orang lain terhadap kawasan kapal adalah relevan, PK terpelajar terkhilaf apabila gagal untuk menguji keterangan responden dengan keterangan SP3 yang

tidak dicabar bahawa responden telah memberikannya eksh P50A–E apabila ditanya sama ada dia mempunyai lesen untuk membawa senjata api dan peluru tersebut. Ini adalah keterangan yang tidak boleh disangkal bahawa dia mempunyai pengetahuan mengenai senjata api tersebut. Walaupun individu yang tidak dikenalpasti telah membawa senjata api dan peluru atas kapal tersebut, fakta ini secara sendiri tidak membebaskan responden akan kesalahan yang dipertuduhkan sekiranya dia mempunyai pengetahuan akan senjata api dan peluru tersebut dan dia dianggap untuk mengedarnya berdasarkan s 7(2) Akta. Tiada keraguan munasabah boleh ditimbulkan kepada kes pendakwaan oleh pengataan tanpa asas responden bahawa wujud kebarangkalian senjata dan peluru tersebut mungkin dibawa atas kapal oleh individu yang tidak dikenalpasti (lihat perenggan 37–38, 43, 45 & 50).

(3) Ekshibit P50A–E dengan sendirinya tidak membuktikan milikan senjata api dan peluru, akan tetapi tindakan responden memberikannya kepada SP3 apabila diminta untuk mengemukakan lesen senjata selepas penemuan senjata api dan peluru adalah relevan untuk membuktikan bahawa dia mempunyai pengetahuan senjata api dan peluru. Kerelevanan fakta tersebut tidak berada dalam kebenaran kandungannya tetapi fakta bahawa ianya dikemukakan oleh responden untuk menunjukkan bahawa dia mempunyai lesen untuk membawa senjata tersebut walaupun beliau sebenarnya tidak. Adalah jelas bahawa perkara ini adalah relevan untuk membuktikan keadaan mental responden pada masa dia diminta untuk mengemukakan lesen senjata (lihat perenggan 56 & 59–60).]

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359 (refd)
Browne v Dunn (1893) 6 R 67 (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237; [1956] 1 LNS 17 (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (folld)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28; [1955] 1 LNS 53 (refd)
Mat v PP [1963] 1 MLJ 263; [1963] 1 LNS 82 (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, QBD (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16; [1971] 1 LNS 115 (refd)
Sampo Materials (M) Sdn Bhd v Tenaga Nasional Bhd [2016] 1 MLJ 375, CA (distd)
Subramaniam v PP [1956] 1 MLJ 220, PC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Arms Act 1960 ss 2(1), 8(a), 9(1), (2), 11(1)
Firearms (Increased Penalties) Act 1971 ss 2(1), (1)(a), (1)(b), (1)(c), (1)(d), 7(1), (2)

Appeal From: Criminal Trial Nos PJK 45D-03–07 of 2015 and 45D-03–11 of 2015 (High Court, Alor Setar)

Hanim bt Mohd Rashid (Deputy Public Prosecutor, Attorney General's Chambers) for the public prosecutor.
PG Cyril (Gurmit Singh Hullon with him) (Vignesh Kumar & Assoc) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] The respondent, a South African national, was charged with trafficking in firearms and with possession of ammunition without lawful authority and the two charges against him were as follows:
Amended first charge

> Bahawa kamu pada 18 September 2014 jam lebih kurang 12.30 tengahari di atas sebuah kapal nama 'Mischief' di Pontoon A25 Royal Langkawi Yacht Club, Jalan Dato' Syed Omar, Kuah, di dalam Daerah Langkawi di dalam Negeri Kedah Darul Aman, telah memperdagangkan tujuh (7) senjata api, iaitu tujuh (7) laras senjata rifle jenis AGRO E Beneli nombor siri BB 119750J, BB119749C, BB119751L, BB110341R, BB110344X, BB110287G dan BB110268G. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 7(1) Akta Senjatapi (Penalti Lebih Berat) Akta 37 Tahun 1971.

Second charge

> Bahawa kamu pada 18 September 2014 jam lebih kurang 12.30 tengahari di atas sebuah kapal nama 'Mischief' di Pontoon A25 Royal Langkawi Yacht Club, Jalan Dato' Syed Omar, Kuah, di dalam Daerah Langkawi di dalam Negeri Kedah Darul Aman, telah didapati dalam milikan kamu 1305 peluru, iaitu 800 butir peluru 308 WIN WENCHESTER, 10 butir peluru WW SUPER 44 REM MAG, 25 butir peluru 12 GAUGE, 470 butir peluru 308 atau 7.62 mm x 51 mm (FMJ). Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 8(a) Akta Senjata 1960.

[2] The amended first charge carries the death penalty or imprisonment for life with not less than six strokes of the rotan whilst the second charge carries the penalty of imprisonment for a term of up to seven years, or to a fine not exceeding RM10,000, or to both.

[3] We noted that the second charge does not state that the appellant's

possession of the ammunition was unlawful, but in our view this is not fatal as the charge makes reference to s 8(a) of the Arms Act 1960 ('the Arms Act'), which sets out the elements of the offence, ie being in possession of any arm or ammunition without any arms licence or permit.

[4] We do not think the omission had prejudiced the appellant, nor had it occasioned a serious miscarriage of justice. The appellant knew exactly what the offence was that he was charged with.

[5] At the close of the prosecution case, the learned judicial commissioner ('JC') ruled that a prima facie case had been established against the respondent in respect of both charges. The respondent's defence was accordingly called. At the conclusion of the trial, he was acquitted and discharged of both charges.

[6] This was the public prosecutor's appeal against the order of acquittal and discharge, which we allowed by a unanimous decision after hearing arguments by both sides. We set aside the order of acquittal and discharge and convicted the respondent of the offences charged.

[7] For the amended first charge, we sentenced him to life imprisonment but without whipping due to his age (above 50), and for the second charge we sentenced him to five years imprisonment. These are the grounds of our decision for allowing the prosecution's appeal.

[8] The facts leading to the respondent's arrest and prosecution are as follows. On 14 September 2014, Deputy Superintendent of Police Zamzuri bin Mohd Isa ('SP4') together with Assistant Superintendent of Police Zaidi bin Mohd Safuan ('SP3') carried out surveillance on a yacht named 'Mischief' which was docked at pontoon A25 of the Royal Langkawi Yacht Club, Kuah. The surveillance was carried out from the Yacht Club building and its vicinity. The yacht was suspected to be carrying firearms without licence.

[9] On the fifth day of their surveillance, ie on 18 September 2014 at about 12.15pm, SP4 instructed SP3 and his team to conduct a raid on the yacht. SP4's testimony was that throughout their five day surveillance, they saw only two persons on board the yacht, a male (later identified as the respondent) and a female (later identified as Miss Jantana Jeloh, a Thai national).

[10] Police examination on board the yacht resulted in the discovery of two plastic boxes containing the seven firearms which formed the subject matter of the amended first charge and a gunny sack containing the 1,305 ammunition which formed the subject matter of the second charge. They were found on the deck located at the rear of the yacht. The respondent was present when the

firearms and ammunition were found. In fact it was the respondent himself who opened the plastic boxes. A

[11] After the discovery of the firearms and ammunition, SP3 asked the respondent if he had any licence to carry the firearms. The respondent did not produce any arms licence. Instead, he gave SP3 the documents at exh P50A–E, which contained the identification details of the firearms. The serial numbers appearing in P50A–E matched with the serial numbers appearing on the seized firearms. Nor did the respondent produce any licence or permit for the 1305 rounds of ammunition. B C

[12] This part of SP3's evidence is crucial as it incriminated the respondent in a very material way, yet it was not challenged at all in cross-examination and there was no explanation for the failure to cross-examine. The evidence was therefore deemed to be admitted: see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212. This is settled law and the following pronouncement by Lord Halsbury in the House of Lords case of *Browne v Dunn* (1893) 6 R 67 is relevant: D

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to. E F

[13] The same point was lucidly explained by Mukharji J in *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 in the following terms:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that the testimony given could not be disputed at all. *It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice*. It serves to prevent surprises at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is made comes to give evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or which that witness had any share. If he asked no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated. (Emphasis added.) G H I

[14] The respondent and his female companion were then taken into custody by SP4. Md Isa bin Edan ('SP10') of the Langkawi police district who dealt with applications for arms licences confirmed that the yacht never applied for a licence to carry firearms into Langkawi waters.

[15] The firearms and ammunition were sent to the Armament Officer ASP Wan Roslan bin Wan Mohamad ('SP2') for ballistic tests. He found them to be serviceable. SP2's armament report is at exh P36.

[16] Section 2(1) of the Firearms (Increased Penalties) Act 1971 ('the FIPA') defines 'traffic in firearms' as to mean any of the following acts:

(a) to sell or transfer, or keep or expose for sale or transfer, a firearm in contravention of sub-s 9(1) of the Arms Act;

(b) to repair or accept for repair a firearm in contravention of sub-s 9(2) of the Arms Act;

(c) to transfer, sell or offer for sale a firearm to a person other than a person specified in sub-s 11(1) of the Arms Act; or

(d) to import a firearm in contravention of sub-s 15(1) of the Arms Act.

[17] The definition is to be read together with s 7(2) of the FIPA which reads:

> 7(2) Any person proved to be in unlawful possession of more than two firearms shall be presumed to be trafficking in firearms.

[18] Section 9(1) of the Arms Act referred to in s 2(1)(a) of the FIPA makes it an offence for any person to sell, transfer, or keep or expose for sale or transfer, any arms or ammunition unless he is the holder of a valid licence to deal in arms and ammunition.

[19] 'Unlawful possession of a firearm' is also defined by s 2(1) of the FIPA and is as follows:

> 'unlawful possession of a firearm' means possession, custody or control of a firearm, or the carrying thereof, in contravention of the Arms Act 1960.

[20] With respect to the second charge, s 2(1) of the Arms Act gives the following meaning to the word 'ammunition':

> means ammunition (including blank ammunition) for any arm as hereinafter defined, and includes grenades, bombs and other like missiles, whether capable of use with arms or not, and any ammunition containing, or designed or adapted to contain, any noxious liquid, gas or other thing;

[21] In ruling that the prosecution had succeeded in establishing a prima facie case against the respondent in respect of the first charge, the learned JC found as follows:

> 23. Saya berpendapat pihak pendakwaan telah membuktikan barang kes senjata api iaitu tujuh laras rifle pelbagai jenis dalam pemilikan Tertuduh bagi maksud peruntukan s 7(2) Akta 1971. Saya telah meneliti keterangan SP4 dan SP3 yang diberikan sepanjang perbicaraan. Pemilikan seharusnya dikaitkan dengan pengetahuan tertuduh kepada barang kes yang dijumpai oleh SP6 dan anggotanya. Pengetahuan ini disimpulkan daripada tindak tanduk tertuduh telah mengemukakan dokumen P50A–E kepada SP3. Tertuduh mendakwa dokumen-dokumen yang diserahkan merupakan permit atau lesen menyimpan senjata api. Sebaliknya hasil pemeriksaan SP3, P50A–E bukannya permit bagi maksud peruntukan s 9(1) Akta 1960.

[22] It was a firm finding of fact by the learned JC that the respondent knew about the firearms at the time of his arrest. The presumption of trafficking under s 7(2) of the FIPA therefore applied against him as the number of firearms in his possession was more than two units.

[23] With the activation of the presumption, the respondent must, in order to succeed in his defence, adduce evidence to show that he was not trafficking in the firearms within the meaning of s 2(1) paras (a)–(d) of the FIPA.

[24] As for the second charge, the basis for the learned JC to call for the respondent's defence was that all elements of the offence had been established by the prosecution. In particular, it was his finding of fact that the respondent had knowledge of the ammunition. This is a correct finding as it could not have been a coincidence that the ammunition were found together with the firearms.

[25] When called upon to state his defence, the respondent chose to give evidence on oath. His defence was that he knew nothing about the firearms and ammunition. He said he was only working 'freelance' for the captain of the yacht by the name of Nick Coombes.

[26] The respondent's explanation for not knowing that there were firearms and ammunition on board the Mischief was that at the time of his arrest, he had only been working on board the yacht for six days and that at the same time he was also working with other yachts such as 'Tatiana', 'Shamoon', 'Sirannity', 'Tanbas', 'Catatude' etc.

[27] He testified that his job on board the Mischief was only to do maintenance works. He said he had no business to enter the compartment area where the firearms and ammunition were found. This is what he said in

examination-in-chief:

> Q: When you were on board could you not see inside the place where the guns etc were found?
>
> A: My working area was the engine room, the cockpit, the cabin and the toilets. I had no reason or authority to examine other areas of the yacht. Anyway when the police raided they found that the compartment at the back of the yacht (hereinafter referred to as 'the compartment') where the guns etc were found was locked.

[28] He claimed that about a week before his arrest, Nick Coombes asked him to fix the system called automatic identification system on board the yacht. He said there were other people who went on board while he was fixing the system but had no idea who they were. He went on to say that it was 'possible' that the firearms and ammunition were brought on board by unknown persons. He said he never opened the two plastic boxes containing the firearms.

[29] The respondent admitted signing the search list at exh P42, but said he did not understand the contents. As for exh P50A–E, he categorically denied producing it to SP3, directly contradicting SP3's unchallenged testimony that he did, whose evidence the learned JC had accepted as true.

[30] It is pertinent to note that although the respondent was called upon to answer a charge of trafficking (amended first charge) under s 7(1) of the FIPA, nowhere in his defence did he say that he was not trafficking in the firearms within the meaning of s 2(1) of the FIPA.

[31] Rather, as we mentioned, his defence was that he did not know that there were firearms and ammunition on board the yacht. It was a defence that he was not even in 'possession' of the firearms and ammunition as the word is understood in criminal law: *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17; *Leow Nghee Lim v Reg* [1956] 1 MLJ 28; [1955] 1 LNS 53.

[32] By putting up the defence of no knowledge rather than the defence of no trafficking, the statutory presumption of trafficking under s 7(2) of the FIPA remained unrebutted at the conclusion of the trial. The respondent's defence therefore stood or fall on his claim that he had no knowledge of the firearms.

[33] In fact, the learned JC in acquitting the respondent of the first charge decided the case on this basis and not on the basis that the respondent was not trafficking in the firearms. The same basis was used for acquitting the respondent of the second charge. Given the respondent's line of defence, it

must follow that if he failed in his defence of no knowledge, he must be convicted of the offences charged as there was no other defence that he could fall back on.

[34] Whether or not the respondent had knowledge of the seven firearms and 1,305 rounds of ammunition is primarily a question of fact and must be judged from his outward acts or omissions: see *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585.

[35] Despite having found at the close of the prosecution case that the respondent had full knowledge of the firearms and ammunition, which means the respondent was in mens rea possession of the firearms and ammunition, the learned JC at the conclusion of the trial found that possession had not been proved beyond any reasonable doubt by the prosecution. He found that the respondent's explanation had cast a reasonable doubt in his mind as to whether or not the respondent was in possession of the firearms and ammunition at the time of his arrest: *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82.

[36] It was a reversal of his earlier finding that the respondent was in possession of the firearms and ammunition. This was his reason:

> Saya telah menimbangkan pembelaan Tertuduh berkaitan pemilikan ini dengan mengimbau semula kes pendakwaan, ada kemungkinan pihak-pihak yang dinyatakan sebelum ini mempunyai akses atas kapal layar 'Mischief' termasuk *compartment* di mana barang kes dijumpai. Pendakwaan gagal membuktikan meragui keraguan yang munasabah Tertuduh memiliki tujuh laras riffle (Pertuduhan Pertama Pindaan) dan 1305 butir amunisi (Pertuduhan Kedua).

[37] It is obvious that the possibility of access by others to the compartment area of the yacht, including by Miss Jantana Jeloh, weighed heavily in the learned JC's mind in finding that possession had not been proved beyond any reasonable doubt. There were other factors that he took into account, as follows:

(a) the respondent was working in the cockpit area of the yacht and there was no evidence that he entered the compartment where the firearms and ammunition were found;

(b) the investigation officer failed to investigate whether the respondent's fingerprints or DNA were found on the incriminating exhibits;

(c) at the time of the raid, the respondent was in the cockpit of the yacht, which was far away from the compartment which was located at the rear of the vessel; and

(d) the owners of the incriminating exhibits, namely Universal Maritime Solutions (BVI) Ltd and the owners of the yacht, namely Andrew Middleton and an individual by the name of Loo Hean Wa too had access to the yacht.

[38] With due respect to the learned JC, although all the above were relevant considerations, he fell into error in failing to test the respondent's evidence against and in the light of SP3's unchallenged testimony that the respondent gave him P50A-E when asked if he had any licence to carry the firearms and ammunition.

[39] In *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, the Federal Court in affirming the decision of this court endorsed the following pronouncements by Gopal Sri Ram JCA (as he then was) delivering the unanimous decision of the court in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97:

> Suffice to say that we re-affirm the proposition that an appellate will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.
>
> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. He must also test the evidence of a particular witness against the probabilities of the case.

[40] *Gan Yook Chin* was decided in the context of a civil case, but in our view the principle laid down is equally applicable to criminal cases.

[41] The learned JC appears to have taken the view that the prosecution must prove exclusive possession of the firearms and ammunition before criminal liability could be attached to the respondent. This is evident from the heavy emphasis he placed on the possibility of others having access to the compartment area where the firearms and ammunition were found.

[42] This approach has been held to be wrong by the Federal Court in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209. In that case, which was a drug trafficking case, the learned trial judge had said that the matter of access by others was 'to negative the proof of exclusive possession'. In delivering the decision of the court, Abdul Aziz Mohamad FCJ said:

> It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be

> in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, — that is, 'exclusive' — that a conviction is possible.

[43] The respondent could have denied knowledge or at least to have expressed surprise at the discovery of the firearms and ammunition, but instead of denying knowledge and expressing surprise, he provided SP3 with P50A–E which contained the registration details of the firearms. This is irrefutable proof that he knew about the firearms, contrary to the finding of the learned JC at the conclusion of the trial.

[44] If indeed the respondent had no knowledge of the firearms and ammunition, he would not have given P50A–E to SP3. The fact that he was in possession of P50A–E rebutted his claim that he had no knowledge of the firearms.

[45] The question for our determination was whether the doubt that the learned JC entertained on the question of possession was a real and reasonable doubt. In our view, no reasonable doubt could have been cast in the prosecution's case by the respondent's bare assertion that there was a possibility that the firearms and ammunition could have been brought on board by unknown persons while he was fixing the automatic identification system.

[46] The suggestion was that it was these persons who had placed the firearms and ammunition in the compartment area of the yacht without his knowledge. He was not however specific as to the time these persons went on board and for what purpose. More importantly, there was no evidential basis for such suggestion by the respondent.

[47] The law is settled that the prosecution is only required to prove its case beyond any reasonable doubt and not beyond the shadow of a doubt. On the degree of proof required, we reproduce below the oft-quoted pronouncement by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 at p 373:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt.

[48] Sharma J spoke in the same vein when he said in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16; [1971] 1 LNS 115:

The following definition of 'reasonable doubt' is often quoted:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.
>
> It has again been said that 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there. Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. *A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence*. (Emphasis added.)

[49] In *Underhill's Treaties on the Law of Criminal Evidence* (5th Ed, Vol 1 at p 34), the following passage can be found:

> A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in their minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt.

[50] Even if it is true that unknown persons had brought the firearms and ammunition on board the yacht, this fact alone does not exonerate the respondent of the offences charged if otherwise he had knowledge of the firearms and ammunition and was presumed to be trafficking by virtue of s 7(2) of the FIPA. It is implausible that the respondent would not know what these persons were doing in the compartment area of the yacht while he was on board.

[51] After all, as can be seen from the photos at exh P4(A) and (B), the yacht is not such a big yacht that he was totally prevented from seeing what those allegedly unknown persons were doing at the rear of the yacht. The impression that the appellant was trying to create was that he was not in the least interested in what the strangers were doing in the compartment area of the yacht. This cannot be true, given the fact that he was in charge of the yacht.

[52] Moreover, it was not just a single and small firearm such as a pistol that was found on board the yacht but eight semi-automatic rifles (one confirmed to be not serviceable) and not just a single round of ammunition but 1,305 of them.

[53] The respondent's claim that one week prior to his arrest some unknown persons boarded the yacht while he was fixing the automatic identification system as requested by Nick Coombes was clearly tailored to counter SP4's evidence that during the five-day surveillance that they carried out, they did not see anyone else boarding the yacht other than the respondent and his female companion.

[54] We shall now deal with the admissibility of exh P50A–E. It was admitted in evidence by the learned JC at the prosecution stage of the case but after hearing the defence case, he ruled it to be inadmissible for the reason that the contents had not been proved, relying on this court's decision in *Sampo Materials (M) Sdn Bhd v Tenaga Nasional Bhd* [2016] 1 MLJ 375. He quoted the following passage in the judgment:

> [53] It is settled law that the mere fact that a document is marked as an exhhibit as P6 and P4 were in this case, did not render both documents admissible until the contents is properly proven.

[55] The learned JC went on to say that even if P50A–E was admissible, it did not provide proof that the respondent was in possession of the firearms and ammunition.

[56] With all due respect to the learned JC, we must say at the outset that this is a serious misappreciation of the evidence and the probabilities of the case. By itself P50A–E may not prove possession of the firearms and ammunition, but the respondent's act of giving it to SP3 on being asked to produce an arms licence after the discovery of the firearms and ammunition is highly relevant to prove that he had knowledge (and therefore possession) of the firearms and ammunition.

[57] The learned JC's reliance on *Sampo Materials* is misconceived. In that case, the truth of the contents of the documents was relevant but that is not the case with P50A–E. This court held the documents in that case to be inadmissible because the purpose of adducing the evidence was to prove the truth of the contents, yet the makers of the documents were not called to give evidence.

[58] By not calling the makers of the documents to be cross-examined, the veracity of the documents, ie P6 and P4 could not be ascertained. The court also noted that the sum of RM340,002.72 was not even reflected on P4 and no evidence was adduced to show how that sum was arrived at.

[59] In the case before us, the relevance of P50A–E lies not in the truth of its contents but in the fact that it was produced by the respondent to show he had

a licence to carry the firearms when in fact he had none.

[60] Therefore the purpose of producing the evidence was not to prove the truth of the contents of P50A–E but to prove the respondent's knowledge of the firearms and ammunition. The evidence was clearly relevant to prove the respondent's mental state at the time he was asked by SP3 to produce an arms licence for the firearms and ammunition, ie that he was aware of the presence of the firearms and the ammunition and he knew that he had no licence to carry them but tried to mislead SP3 by showing P50A–E to him.

[61] The case on point is *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220 where the judicial committee of the Privy Council held as follows:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before Their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes.

[62] In any event, we were of the view that even without P50A–E, the only reasonable inference to be drawn from all the circumstances of the case is that the respondent had knowledge of the firearms and ammunition. The totality of the evidence unerringly points in that direction. We were therefore of the view that the learned JC was wrong in reversing his earlier ruling that the respondent was knowingly in possession of the firearms and ammunition.

[63] At the risk of repetition, we need to reiterate that the documents in P50A–E were admissible, not to prove the truth of their contents, but to prove the respondent's state of mind, ie his knowledge of the firearms and ammunition at the time of his arrest.

[64] Had the learned JC kept to his ruling at the close of the prosecution case that P50A–E was admissible in evidence, he would not have, at the conclusion of the trial, entertained any doubt in his mind that the respondent was knowingly in possession of the firearms and ammunition.

[65] It was for all the reasons aforesaid that we allowed the public prosecutor's appeal and convicted the respondent of the offences charged.

Appeal allowed, respondent sentenced to life imprisonment for the first charge and five years imprisonment for the second charge.

Reported by Izzat Fauzan